V (30)

No. 1132

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

HARVEY B. McALLISTER, *Petitioner*,

v.

CITY OF MOODY, TEXAS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Petitioner seeks review of a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, (R. 67), affirming order of dismissal (R. 59-60) of the District Court of the United States for the Western District of Texas, Waco Division, sustaining motion of respondent to dismiss (R. 58-9).

Petitioner, plaintiff in the trial court, sued respondent (first amended original petition, R. 56-7) for $22,200.00, which petitioner alleged he would have made, under his contracts with respondent, as engineering fees, in connection with the building of a water works, sanitary sewer, light and power plant, and ice and cold storage system, for and to be municipally owned by respondent, had he been permitted by it to carry out his contracts. The contracts were alleged to have been of date June 9, 1936 (R. 56) "under the terms of which defendant agreed, bound and obligated itself to pay to plaintiff certain engineering fees in connection with" said construction, which systems were "to be owned by said city." Attached and made part of the amended petition, as Exhibit A (R. 29-35), is the original contract; petitioner alleging additional contract "in the form of a

city council resolution" in possession of respondent, which was notified to produce same (R. 56-7). It is alleged (R. 57):

> "that thereafter, the Defendant, City of Moody, breached and attempted to repudiate said contracts, that said Plaintiff learned of such breach on or after the 20th day of February, 1938, that at all times from the executions of said contracts up to the present time, Plaintiff has been ready, willing and able to perform the services therein set forth, but has been prevented by the action of the Defendant; that had Plaintiff been permitted to continue under the terms of the aforesaid contracts, he would have been entitled to receive therefor the sum of $22,200.00."

Prayer was for such sum, with interest, costs and for general relief.

Exhibit A (R. 29) evidences employment of petitioner by respondent, being an engineering contract, dated June 9, 1936, employing petitioner as consulting engineer "to furnish plans, specifications and to superintend the construction of the above utilities for owner," and, (R. 34), petitioner's acceptance, reciting that petitioner will "get busy and aid the city * * * in the building of the above Water Works, Sewer System, Light and Power Plant, and other facilities that City of Moody desires to build at this time * * * requests full cooperation * * * in fulfilling the above contract" (R. 34-5). The contract recites that petitioner is to receive six per cent of costs of the projects, and in subparagraphs (1) to (10), inclusive (R. 30), recites the engineer's services consist of:

"valuation surveys, maps, reports, conferences, etc., to enable the city to purchase and get rid of competition of existing small utilities, if desired; the necessary conferences, the preparation of preliminary studies, working, drawings, specifications, large scale or full sized drawings, as occasions necessitate, the drafting of the forms of proposals and contracts; the issuance of certificates of payment; the keeping of accounts, the general administration of the business and the supervision of the work during promotion and construction of the above named utilities and work."

The contract provides how payments shall be made to petitioner, for his supervision, for preliminary estimates, as required, the meaning of the cost of the work, the ownership of documents, the number of sets of plans to be furnished, against assignment of the contract, for compliance with the rules of the PWA or such concern that contributes cash by loans or grant, that owner shall fill out and file all needed papers for loan or grant, or both, or make necessary application for private funds, and press all applications to secure funds needed, and that owner's failure or refusal to apply for or diligently press such applications shall be a breach, and that both owner and engineer agree to full performance and to do all in their power to secure needed construction funds, and to build the utilities.

Suit was filed February 15, 1943 (R. 44).

Respondent filed motion November 1, 1943 (R. 58-9) to dismiss because contract sued on:

"1 * * * is unenforceable because it attempts to bind the city for contingent acts performable in the future for which there was then existent no authority of law.

"2 * * * is conditional only, and the City within its governmental powers had authority to refuse to perform.

"3 * * * attempts to bind the City to expend the money over a long and indefinite period and for more than one year without first having levied a tax to pay same.

"4 * * * attempts to bind the City to pay out money at a time when there were no funds available for such purpose, and such contract is opposed to the public policy of this State.

"5. Said petition does not conform to the rules of civil procedure applicable to this Court in that it is not a brief and terse statement of Plaintiff's Cause of Action, but same is a running narrative wherein inflammatory and irrelevant allegations are so intermingled with allegations of fact as to make said petition unintelligible and it is impossible to determine therefrom Plaintiff's precise claim.

"6. This suit on its face is barred by the four year statute of limitation in that it appears therefrom that the City had breached its contract more than four years prior to the filing of this suit.

"7. For the reason that it affirmatively appears from the petition in Paragraphs 22, 22a, 22b, 22c, 22d and 23 that plaintiff himself failed to perform and failed to furnish the financing as stipulated in the contract."

Grounds 5 and 7, dealing with form and averments of the original petition, are inapplicable because, pending the motion to dismiss, the amended petition was filed November 23, 1943 (R. 57).

The motion was granted, and cause dismissed, by order of March 6, 1944 (R. 59-60).

The case having gone off on motion to dismiss, the facts appear exclusively, of course, in the petition, and attached exhibits made part thereof.

This is a companion case to that of *Harvey B. McAllister, Petitioner,* v. *City of Riesel, Texas, Respondent,* in which petition for writ of certiorari is filed on the same date as in this cause. That is to say, the facts, such as the contracts and dates thereof, and dates of breach and of filing petitions, differ in the two cases; but the legal questions are identical, —identical motion in the Riesel case was filed, and identical order of dismissal entered in the two cases. The two causes were submitted at the same time in the Circuit Court of Appeals, and decided on the same date. In the instant case, memorandum opinion was written, affirming the order of dismissal "upon the same grounds as stated in *McAllister* v. *City of Riesel,* decided this date" (R. 66). The opinion in the City of Riesel case referred to is reported in 146 Fed. (2) 130. The grounds of affirmance as there stated were:

> (a) That the contract was so vague and indefinite as not to be enforcible (a ground not

asserted in the trial court), and that right to compensation was contingent under the contract.

(b) That the amended petition was insufficient in that:

(1) It does not allege performance of the conditions precedent to petitioner's right to recover;

(2) That the performance was wrongfully prevented by the City; nor

(3) That the period from September 2, 1935, until July 15, 1938, was not a reasonable time within which to perform the conditions precedent; nor

(4) Was performance of the conditions precedent alleged or excused.

II.

BASIS OF JURISDICTION

1. The Supreme Court has jurisdiction to review the judgment in question under the provisions of Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, (U.S.C.A. Title 28, Chap. 9, Sec. 347 (a)).

2. The date of the judgment of the Circuit Court of Appeals was December 5, 1944 (R. 67); petition for rehearing timely filed December 26, 1944 (R. 88-70); considered and overruled, without additional opinion, January 11, 1945 (R. 79).

3. The questions here presented arise solely on the pleading and involve primarily the validity and enforcibility of petitioner's contract of employment with respondent, and secondly, the sufficiency of his pleading (first amended petition, R. 56-7), with Exhibits attached (R. 29-35), as assailed by the specific grounds alleged in the motion to dismiss (R. 58-9). The order of dismissal in the trial court (R. 59-60) was a general order sustaining respondent's motion, without specifying which of the grounds were sustained. The Circuit Court of Appeals, without considering or discussing the authorities presented in support of petitioner's position, wrote opinion sustaining certain of the grounds alleged in the motion to dismiss, and basing its affirmance on other grounds not asserted in the trial court.

The Circuit Court of Appeals has held not only that petitioner's amended petition was insufficient, but that his contract was so vague and indefinite as not to be enforcible. It is a plain contract, in writing, of employment for certain definite, designated work, as consulting engineer on the job, and with the rate of pay by definite percentage of the cost of construction, agreed upon between the parties, authorized on part of respondent by due resolution of its governing body, the City Council, in regular meeting, and acceptance of the employment and contract by petitioner.

III.

QUESTIONS PRESENTED

There are three principal questions involved:

1st: The error of the Circuit Court of Appeals, —inasmuch as *specific grounds* for dismissal had been presented and sustained in the trial court below,—in considering *any* grounds *outside* the scope of such specific assignments made against the pleading, such as that the contract was so vague and indefinite as not to be enforcible, and again, in its holding that the petition did not allege performance "of the conditions precedent to plaintiff's (petitioner's) right to recover" nor excuse same.

2nd: The validity and sufficiency of petitioner's contract of employment with respondent, as against the holding of the Circuit Court of Appeals that his right to compensation was contingent under the contract, and that the contract was so vague and indefinite as not to be enforcible against respondent.

3rd: The error of the Circuit Court of Appeals in holding the amended petition, with its attached exhibit, insufficient because: (a), it did not allege nor excuse performance "of the conditions precedent to plaintiff's right to recover"; (b), it did not allege performance was wrongfully prevented by the City; and (c), it did not allege "the period from September 2, 1935 until July 15, 1938 was not a reasonable time within which to perform the conditions precedent."

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decision of the Circuit Court of Appeals in this case, in denying respondent's liability on the contract, where the respondent had wrongfully abandoned and refused to perform, on the ground that petitioner's right to compensation was contingent under the contract, and that the contract was vague and indefinite, is contrary to the holdings of the same and other Circuit Courts of Appeals, in the following cases: *City of Del Rio* v. *Ulen*, 94 Fed. (2) 701 (5th Cir.); *Bay City* v. *Frazier*, 77 Fed. (2) 570 (6th Cir.).

2: The Circuit Court of Appeals rendered its decision in this case holding that it was not alleged that the period between the date of making of the contract and date of receipt of notice by petitioner of respondent's breach was not a reasonable time within which to perform the conditions precedent, and thus sustaining respondent's contention presented that the suit on its face was barred by the four-year statute of limitations. This holding is error, and contrary to the decision of the Second Circuit in *Kosolapov* v. *Mandell*, 23 Fed. (2) 593.

3: It is respectfully submitted that the Circuit Court of Appeals in the instant case has so far departed from the accepted and usual course of judicial proceedings in its consideration of matters not raised in the trial court as grounds for dismissal of the peti-

tion, and in holding the contract contingent and so vague and indefinite as not to be enforcible, as well as in holding the amended petition did not state a cause of action, that the exercise of this Court's power of supervision is called for.

WHEREFORE petitioner prays that writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to the end that the errors aforesaid may be corrected by this Court, and that the judgments of the trial court and the Circuit Court of Appeals may be reversed and petitioner afforded opportunity for presentation and decision of his case upon the merits.

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